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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 406

ELIE J. BOUDOIN,
Petitioner-Appellee Below-Appellant

versus

LYKES BROS. STEAMSHIP CO., INC.
Respondent-Appellant Below-Appellee

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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IN THE

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NO. 406

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versus

LYKES BROS. STEAMSHIP CO., INC.
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PETITIONER'S BRIEF ON THE MERITS

MAY IT PLEASE THE COURT:

The opinions delivered in the Courts below are reported as follows:

Lykes Bros. Steamship Co., Inc. v. Boudoin, and reverse title, 211 F. 2d 618-622 (C.C.A., 5th, 1954); and *Boudoin v. Lykes Bros. Steamship Co., Inc.*, 112 F. Supp. 177-180 (D. Ct., E. D. La., 1953).

JURISDICTION

This cause is presently before the Court on a writ of certiorari to the Court of Appeals for the Fifth Circuit granted October 14, 1954 under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. 1254 (1). The petition for the writ was timely filed, within ninety (90) days from May 10, 1954, the date on which petitioner's application for rehearing was denied by the Court of Appeals for the Fifth Circuit.[1]

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision applicable to the instant matter is Article 3, Sec. 2, Clause 1:

> "The judicial Power shall extend to all Cases . . . of admiralty and maritime jurisdiction; . . . "

The statutes involved are the *Jones Act*,[2] reading in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all

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[1]Act of June 25, 1948, C. 646, 62 Stat. 961, as amended May 24, 1949, C. 139, § 106, 63 Stat. 104, 28 U.S.C.A. 2101 (c); Department of Banking, State of Nebraska v. Pink, 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254, rehearing denied, 318 U. S. 802, 63 S. Ct. 850, 87 L. Ed. 1166 (1942); R. 509.

[2]Act of June 5, 1920, C. 250, 41 Stat. 1007, 46 U.S.C.A. § 688 et seq.

> statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * * ."[3]

and the *Federal Employers Liability Act*,[4] reading in part as follows:

> "Every common carrier by railway while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * equipment * * *."[5]

> "That in any action brought * * * by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of its officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risk of

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[3]46 U.S.C.A., § 688.
[4]Act of April 22, 1908, C. 149, 35 Stat. 65, 45 U.S.C.A. § 51 et seq., hereinafter referred to as F.E.L.A.
[5]45 U.S.C.A., § 51.

his employment in any case where the violation * * * of any statute enacted for the safety of employees contributed to the injury or death of such employee."[6]

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review on this appeal are:

1. Is a shipowner liable in damages for permitting a crewmember to become excessively intoxicated and so irrational that he commits an assault without provocation using a dangerous weapon?

2. Is a negligent or irresponsible act on the part of an inebriated seaman a reasonably foreseeable consequence of his intoxication?

3. Does the absolute warranty of seaworthiness of the entire *vessel* encompass the vessel's *crew*?

4. If the vessel unconditionally guarantees the seaworthiness of a crewmember, should a shipowner be excused from liability if it does not *know* of the seaman's deficiency?

5. Is a seaman unseaworthy who is *not* equal in disposition and temperament to the ordinary man in the calling?

6. Is a seaman competent, fit, seaworthy, and an ordinary man in the calling, if he does the following:

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[6] 45 U.S.C.A., § 54.

(a) drinks aboard ship in violation of the articles of agreement and company rules;

(b) becomes a vicious criminal aboard ship because of excessive drinking;

(c) enters another's sleeping quarters in the dead of night to commit a crime;

(d) pilfers on the ship;

(e) assaults with dangerous weapons;

(f) unprovokedly batters a shipmate with a glass bottle;

(g) threatens the vessel's officers with bodily harm;

(h) disobeys the lawful commands of the master;

(i) succumbs to an addiction to overindulgence in drink;

(j) vents a brutal disposition;

(k) absents himself from the vessel against explicit orders of the captain; and

(l) conducts himself aboard ship in such manner as to require restraint with irons.

7. Should an appellate tribunal set aside a trial court's findings of fact which are not clearly erroneous?

INTRODUCTION

During the past six decades cases considered by the federal courts involving assaults upon seamen aboard ships are not uncommon.[7]

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[7]Alpha S. S. Corp. v. Cain, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086 (1930); Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. E. 1032 (1930); Kelcey v. Tankers Co., Inc., 217 F. 2d (C. C. A. 2d, 1954); Jones v. Lykes Bros. S. S. Co., Inc., 204 F. 2d 815 (C.C.A. 2d, 1953); Keen v. Overseas Tankship Corp., 194 F. 2d 515 (C.C.A. 2d, 1952); Jensen v. United States, 184 F. 2d 72 (C.C.A. 3rd, 1950); Kable v. United States, 169 F. 2d 90 (C.C.A. 2d, 1948); Pittsburgh S. S. Co. v. Scott, 159 F. 2d 373 (C.C.A. 6th, 1947); Brailas v. Shepard S. S. Co., 152 F. 2d 849 (C.C.A. 2d, 1945); Kyriakos v. Goulandris, 151 F. 2d 132 (C.C.A. 2d, 1945); Koehler v. Presque-Isle Transp. Co., 141 F. 2d 490 (C.C.A. 2d, 1944); Lykes Bros. S. S. Co., Inc. v. Grubaugh, 128 F. 2d 387 (C.C.A. 5th, 1942); Yukes v. Globe S. S. Corp., 107 F. 2d 888 (C.C.A. 6th, 1939); Nelson v. American-West African Lines, Inc., 86 F. 2d 730 (C.C.A. 2d, 1936); The Rolph, Rolph Navigation & Coal Co. v. Kohilas (Kaptein, et al., Intervenors), 299 F. 52 (C.C.A. 9th, 1924); The Whisper, Wolfe v. Thomas, 268 F. 464, (C.C.A. 6th, 1920); Gabrielson v. Waydell, et al., 67 F. 342 (C.C.E.D.N.Y., 1895); Stankiewicz v. United Fruit S. S. Corp., et al., 123 F. Supp. 714 (D. Ct. S.D.N.Y., 1954); Thompson v. Coastal Oil Co., 119 F. Supp. 838, (D. Ct. D.N.J., 1954); Campbell v. Waterman S. S. Corp., 110 F. Supp. 146 (E. D. Penna. 1952); Condon v. Grace Line, et al., 97 F. Supp. 197 (N. D. Calif., S. Div. 1951); Montiero v. Paco Tankers, Inc., et al., 93 F. Supp. 93 (E. D. Penna. 1950); Colon v. U. S., 74 F. Supp. 216 (D. Ct. S.D.N.Y. 1947); Nowery v. Smith, 69 F. Supp. 755 (E. D. Penna. 1946); Hong v. U. S., 59 F. Supp. 794 (D. Ct. S.D.N.Y. 1944); Blakeley v. Pan-Atlantic S. S. Corp., 1942 A.M.C. 662 (D. Ct. S.D.N.Y. 1942); Brock v. Std. Oil Co. of N. J., 33 F. Supp. 353 (D. Ct. E. D. Penna. 1940); Carpenter v. Matson Navigation Co. (The Hamakua), 1940 A.M.C. 532 (D. Ct. S.D.N.Y. 1940); Wilcox v. U. S.; Sullivan v. U. S., 32 F. Supp. 947 (D. Ct. S.D.N.Y. 1940); The Mariner, 1939 A.M.C. 295 (D. Ct. S. D. Calif. 1939); Stratton v. U. S., et al. 8 F. Supp. 429 (D. Ct. S.D.N.Y. 1934); Jensen v. U. S. (The Anaconda), 1934 A.M.C. 709, (D. Ct. S.D.N.Y. 1934); West v. Calmar Steamship Corp. (The Cubore) 1932 A.M.C. 435, (D. Ct. S.D.N.Y. 1932); Birks v. United Fruit Co., Inc., 48 F. 2d 655, 656, (D. Ct. S.D.N.Y. 1930); Sutherland v. Ore Steamship Corp., 1929 A.M.C. 1454 (D. Ct. S.D.N.Y. 1929); Fein v. U.S.A. & A. H. Weinnich (The Wawalona) 1925 A.M.C. 552 (D. Ct. of Oregon); The Robinson, 3 F. 2d 507 (D. Ct. E. D. Penna. 1925); The Sinaloa, 292 F. 640 (D. Ct. N. D. Calif. 1923); The Ludlow, 280 F. 162 (D. Ct. N. D. Fla. 1922); The

(Continued)

We find these causes grouping themselves under one or more of the following theories of liability:

1. *Respondent superior:* where the assault was committed by the victim's superior while the latter was asserting the authority conferred upon him by the shipowner;[8]

2. *Direct negligence:* where the assault resulted from the failure of those in authority, representing the employer,

(a) to maintain proper order, discipline and good treatment aboard ship, or

(b) to discharge or restrain a **known** vicious

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[7] Continued —
Vueltabajo, 163 F. 594, (D. Ct. S. D. Ala. 1908); The Sallie Ion, 153 F. 659 (D. Ct. E. D. Penna. 1907); The Astral, 134 F. 1017 (D. Ct. E. D. Penna. 1905); The Lizzie Burrill, 115 F. 1015 (D. Ct. S. D. Ala. 1902); The Eva B. Hall, 114 F. 755 (D. Ct. S.D.N.Y. 1902); The Kentigirn, 99 F. 443, (D. Ct. E.D.N.Y. 1900); The Marion Chilcott, 95 F. 688 (D. Ct. D. Wash., N. Div. 1899); The Fred E. Sander, 95 F. 829, (D. Ct. D. Wash. 1899).

[8] Alpha S. S. Corp. v. Cain; Jamison v. Encarnacion; Kable v. U. S.; Pittsburgh S. S. Co. v. Scott; Nowery v. Smith; Brailas v. Shepard S. S. Co.; Lykes Bros. S. S. Co., Inc. v. Grubaugh; Yukes v. Globe S. S. Corp.; Nelson v. American-West African Line, Inc.; Campbell v. Watermann S. S. Corp.; Colon v. U. S.; The Mariner; West v. Calmar S. S. Corp.; Sutherland v. Ore S. S. Corp.; Wolfe v. Thomas (The Whisper); The Ludlow; all *supra*, note 7.

crewmember or officer so as to prevent the abuse to the injured seaman;[9] and

3. *Unseaworthiness:* where the assailant was of such sub-standard disposition and temperament as to be unequal to the ordinary man of the calling and therefore defective, rendering the vessel unseaworthy.[10]

In the instant case both the assailant and the victim were subordinate employees. Therefore, the case at bar does *not* present a typical *respondeat superior* situation.

STATEMENT OF FACTS

Boudoin, a merchant seaman, sued his employer to recover damages for personal injuries sustained during November of 1949 aboard the Steamship MASON LYKES

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[9]Jensen v. U. S.; Nowery v. Smith; Brailas v. Shepard S. S. Co.; Kyriakos v. Goulandris; Koehler v. Presque-Isle Transp. Co.; all *supra*, note 7. The David Evans, 187 F. 775 (C.C.A. 9th, 1911); The John & Winthrop, 182 F. 380 (C.C.A. 9th, 1910); The Thrasher, 173 F. 258 (C.C.A. 9th, 1909); Gabrielson v. Waydell, et al.; Stankiewicz v. United Fruit S. S. Corp., et al.; Campbell v. Waterman S. S. Corp.; Condon v. Grace Line, et al.; Montiero v. Paco Tankers, Inc., et al.; Hong v. U. S.; Blakeley v. Pan-Atlantic S. S. Corp.; Brock v. Standard Oil Company of N. J.; Carpenter v. Matson Navigation Co. (The Hamakua); Wilcox v. U. S.; Sullivan v. U. S.; Jensen v. U. S. (The Anaconda); The Robinson; The Sinaloa; The Astral; The Lizzie Burrill; The Marion Chilcott; The Fred E. Sander; all *supra*, note 7.

[10]Kelcey v. Tankers Co., Inc.; Jones v. Lykes Bros. S. S. Co., Inc.; Keen v. Overseas Tankship Corp.; Rolph Navigation Co. v. Kohilas (The Rolph); *supra* note 7; and see Bonsalem v. Byron S. S. Co., Ltd., 50 F. 2d 114 (C.C.A. 2d, 1931); Stankiewicz v. United Fruit S. S. Corp., et al.; Thompson v. Coastal Oil Co.; The Sinaloa; Fein v. U. S. and A. H. Weinnich; all *supra* note 7.

then anchored at Walvis Bay, Africa.[11] He was assaulted by another member of the vessel's crew, Gonzales, who struck him on the head with an unopened bottle of souvenir brandy[12] which Gonzales was attempting to steal from Boudoin's forecastle.[13]

In the early evening of November 24, 1949, Gonzales and several other men from this vessel went ashore and drank until the shoreside establishments closed,[14] whereupon they bought three more bottles (fifths or quarts) of whiskey.[15] They returned to the vessel and continued their all-night drinking in the quarters of the boatswain until the early hours of the following morning,[16] notwithstanding that the shipping articles[17] as well as the company's safety rules[18] prohibited consumption of any intoxicants aboard ship.

During the course of the shipboard drinking bout Gonzales drank almost a full bottle more of whiskey[19] and became highly intoxicated.[20]

The noise from the drinking party was audible in the messhall[21] and in the passageway running through the quarters.[22]

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[11]R. 2.
[12]R. 91.
[13]R. 84.
[14]R. 428-429.
[15]R. 430.
[16]R. 430-432.
[17]R. 228, 243-244; Deft.-Pl. Ex. 18.
[18]R. 136, 147-149, 326.
[19]R. 436.
[20]R. 434-435, 475.
[21]R. 78-79.
[22]R. 82-83.

All of the time during which the drinking was going on in the crew's quarters one of the vessel's officers was keeping the watch aboard ship.[23] The duties of the watch officer required him to stay awake and to maintain peace aboard the vessel[24] by making rounds and policing the ship,[25] and by taking effective disciplinary action to suppress any drinking.[26] On the occasion of the drinking party Third Officer Brock made frequent inspections of the crew's quarters.[27]

Gonzales entered Boudoin's room in the crew's quarters, at which time Boudoin, who had not participated in the shipboard drinking party,[28] was asleep or almost asleep in his bed.[29] When discovered, Gonzales struck Boudoin with the glass bottle and threatened to kill him,[30] which threat he later reiterated.[31] Leaving Boudoin's living quarters Gonzales armed himself with a butcher knife.[32] Thereafter, Gonzales, who had a general reputation for belligerence,[33] threatened Third Officer Brock.[34]

Gonzales persisted in his course of unlawful conduct, flaunting the express commands of the captain, absenting himself from the ship, drinking and bringing whiskey

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[23]R. 81.
[24]R. 326.
[25]R. 81-82.
[26]R. 149.
[27]R. 105, 131-132; Pl. Ex. 5.
[28]R. 79.
[29]R. 83, 112.
[30]R. 93, 112-113.
[31]R. 322.
[32]R. 114, 315-316, 319; see also R. 242; Pl. Ex. "U. S. Coast Guard." (Official Log Book and Appendages)
[33]R. 86, 88-90, 114-115, 117-118.
[34]R. 291; see also R. 242; Pl. Ex. "U. S. Coast Guard" (Official Log Book and Appendages)

aboard, until eventually he was restrained by being placed in irons.[35]

Gonzales was fired from this vessel at the termination of the voyage.[36] He was subsequently reemployed by the respondent shipping company on several of its vessels;[37] it developed after the trial that Gonzales was in this company's employ at the time of trial.[38]

SUMMARY OF ARGUMENT

I. *The Vessel's Unseaworthiness*

It is Boudoin's position that his injuries were occasioned by the *unseaworthiness* of the Steamship *Mason Lykes* due to the presence in her crew of another seaman, Gonzales, who unprovokedly assaulted him with a glass bottle.

The trial court found that during the voyage in question the assailant was not equal in disposition and temperament to the ordinary man who follows the sea; and the vessel was thereby rendered unseaworthy, notwithstanding that the shipowner may have been unaware of Gonzales' deficiencies.

On appeal, the *ordinary-temperament-and-disposition* test was disapproved, and it was held that there can be no liability unless the shipowner knew of the assailant's vicious propensities and failed, through its officers, to discharge or restrain the deficient crewmember.

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[35] R. 298.
[36] R. 274, 324.
[37] R. 146, 154, 216.
[38] R. 419.

The view followed by the trial court in determining liability is based upon sound analogy and legal principles and accords with the policy of the maritime law toward seamen; it should be approved by this Honorable Court.

II. *Respondent's Liability for Negligence Under the Jones Act*

The officers of the Steamship *Mason Lykes* knowingly permitted at least three members of the unlicensed crew, including the assailant, Gonzales, to imbibe intoxicants for several hours *aboard ship,* as a result of which Gonzales, who had a general reputation for belligerence especially when drunk, unprovokedly assaulted and battered Boudoin with a glass bottle. There is a rule against drinking aboard ships.

Under the applicable statutes, as interpreted and applied by this Honorable Court, respondent was negligent because:

(1) Boudoin's injury was the legally foreseeable consequence of the ship-officers' failure to prevent shipboard drinking and intoxication;

(2) Failure of the officers to maintain proper order and discipline constitutes a breach of respondent's duty to furnish Boudoin with a safe vessel upon which to live and work; and

(3) An employer should be liable for an unprovoked, wilful assault by one employee upon another of equal station where the victim is sleep-

> ing in his quarters in the course of his employment.

The trial court's conclusion of negligence should be reinstated.

ARGUMENT

POINT I.

THE VESSEL'S UNSEAWORTHINESS

As observed in the application for the writ, Boudoin's claim of "unseaworthiness" brings before this Court a matter of first impression.

The District Court concluded that the presence of Gonzales, the assailant, on board the Steamship "Mason Lykes" constituted a breach of respondent's duty to furnish Boudoin with a seaworthy vessel.[39] The legal test of seaworthiness which the trial Judge applied herein is the standard enunciated by the Court of Appeals for the Second Circuit, through Learned Hand, Circuit Judge, in the case of *Keen v. Overseas Tankship Corporation*[40] to wit:

> A vessel is unseaworthy when it has among its complement of personnel a crewmember who is unequal in disposition and temperament to the ordinary man in the calling of merchant seamen.

It is this test or standard which the Court of Appeals for

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[39]Trial Court's conclusions 2, 3, 4 and 5; R. 486; 112 F. Supp. 180.
[40]194 F. 2d 515 (C.C.A. 2d, 1952).

the Fifth Circuit has repudiated.[41] Thus, the present appeal, insofar as the claim of unseaworthiness is concerned, presents the question as to whether the *Keen* case is or is not to be approved.

(a) THE NATURE AND EXTENT OF THE WARRANTY OF SEAWORTHINESS

The broad foundation upon which the *Keen* decision rests is the vessel owner's duty to provide a *seaworthy* vessel for the crew. That this *warranty of seaworthiness* runs in favor of the seaman has not been seriously disputed since the decision in *The Osceola.*[42]

The nature and quality of this warranty to the seaman are firmly established. It is *absolute,* a species of *liability without fault,* independent and irrespective of knowledge, of due diligence and of the customary concepts of negligence.[43] The warranty encompasses not only the vessel, but also her appurtenances,[44] her appliances[45] and her supplies;[46] no less pertinent to the instant case, the warranty extends to the fitness of the crew as regards their sufficiency in number,[47] their ability to carry on the voyage in

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[41] Opinion of the Court of Appeals, R. 507:
"We, therefore, decline to accept the so called standard laid down in the Keen case or to approve the action of the Court below in attempting to apply it here."

[42] 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903).

[43] Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

[44] Id.

[45] Manich v. So. S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944).

[46] Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927 (1922).

[47] Holland v. Seven Hundred Twenty-Five Tons of Coal, 36 F. 784, (E. D. Wis., 1888).

the absence of the Master,[48] their ability to expediently converse with the vessel's officers,[49] and the ability of the master to properly care and provide for a mentally deranged crewmember.[50]

(b) IS THE KEEN CASE UNPRECEDENTED?

The opinion of the Court of Appeals, agreeing with respondent's interpretation of prior jurisprudence, holds that the *Keen* case

> "is a departure from the long settled law governing responsibilities for injuries intentionally inflicted by one seaman upon another, as settled in The Rolph, 299 Fed. 52, and in the other cases relied on by appellant."[51]

Insofar as the said appellate opinion below and also prior decisions,[52] including even the *Keen* decision itself,[53] interpret the decision in *The Rolph* as being based on the *knowledge* of the vicious proclivities of the offending seaman, we submit that these decisions incorrectly conceive the *ratio decidendi* of *The Rolph* case. Analysis of the hold-

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[48]The Giles Loring, 48 F. 463 (D. Maine, 1890).
[49]In re Pacific Mail Line S. S. Co., 130 F. 76 (C. C. A. 9th, 1904).
[50]Spellman v. Am. Barge Line Co., 176 F. 2d 716 (C. C. A. 3d, 1949).
[51]Opinion of the Court of Appeals, R. 505.
[52]Kable v. U. S.; Koehler v. Presque-Isle Transp. Co.; Nowery v. Smith and Birks v. United Fruit Co., Inc.; all supra note 7; see, however, *dictum* in Bonsalem v. Byron S. S. Co., Ltd., 50 F. 2d 144 (C.C.A. 2d 1931) at p. 115: "A recovery might be allowed on the theory of incompetence of officers which constituted unseaworthiness, and such brutality of treatment of a seaman would constitute incompetence, for the owner is *unqualifiedly* bound to provide a seaworthy vessel. The Rolph, 299 F. 52 (C.C.A. 9)." (Emphasis added).
[53]194 F. 2d 515, 517.

ing in *The Rolph* reveals that the *knowledge* of the captain regarding the mate's vicious disposition was *not essential* to the vessel's liability, as is patent from the following portion of the opinion:

> "It is said that the owner does not select the mate and therefore the ship cannot be held. But it is established that while the master of the ship selects the mate, in doing so he is the representative of the owner in respect to the obligation to equip the ship with a competent officer, to make her seaworthy, and *the duty of the owner in such respect is one not to be . . . avoided by the plea that the master did not KNOW the ship was unseaworthy when the voyage was commenced.*"[54] (Emphasis added)

The *Keen* case is no less sound even if, as respondent insists, it has no antecedent authority. *Stare decisis*, or the lack of it, should not hinder the progress of the law. As expressed by Judge Swan in *Cain v. Alpha S. S. Corp., et al.*[55]

> "The maritime law, no less than the common law, is not incapable of growth by judicial decision. Changes in conditions under which commercial shipping is conducted, as well as changes in economic notions of where loss suffered in the course of a business should fall, should be reflected in the action of the courts, even though it result in filling pages which history left blank."

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[54]The Rolph, 299 F. 52, 55 (C.C.A. 9th, 1924).
[55]35 F. 2d 717, 722 (C.C.A. 2d, 1929), disapproved on other grounds in Alpha S. S. Corp. v. Cain, supra note 7.

These considerations of Judge Swan in the *Cain* case are not inconsistent with those of Judge Hand in the *Keen* case, which latter appeal they heard together. The *Keen* trial Judge's apprehension, that the application of the seaworthiness doctrine to the facts of that case would destroy the American Merchant Marine, was assuaged when Judge Hand alluded, in language familiar to Your Honors,[56] to the general current practice of insuring maritime risks.[57]

(c) IS THE KEEN TEST WORKABLE?

The appellate opinion in the instant case substantively criticizes the test of the *Keen* decision on the ground that it is lacking in definiteness and objectivity to such an extent as to embarrass even its alleged creators by a subsequent application[58] in *Jones v. Lykes Bros.*[59] It should be observed first of all that the *Jones* case **affirms** the *Keen* test and simply holds that the assailant in the *Jones* case is not "unseaworthy" when put to that test. The *Keen* case involved one set of facts, the *Jones* case another; unseaworthiness, generally, is no more than a question of fact.[60] Secondly, regarding the workability of the test, it is submitted that no more difficulty attends the determination that a particular seaman is *not of equal disposition to the ordinary man of the sea* than is experienced in concluding that some act or omission attributed to any common alleged tort feasor

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56 Maryland Casualty Co. v. Cushing, 347 U. S. 409, 74 S. Ct. 608, 1954 A.M.C. 837, 845 (1945): "Substantially all maritime risks are insured."

57 Keen v. Overseas Tankship Corp., 194 F. 2d 515, 518.

58 Opinion of the Court of Appeals, R. 506.

59 204 F. 2d 815 (C.C.A. 2d, 1953).

60 Manich v. So. S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 581 (1944).

renders him *not equal to the "average reasonable man."*[61]

It should not be concluded that the doctrine of *Keen* is unworkable merely because in one case a vessel may be seaworthy[62] and in another, under different facts, the vessel is held to be *un*seaworthy.[63] If the facts of two cases are *different*, their results may, and usually do, vary under *any* legal theory.

Nor should the workability of the *Keen* test be questioned merely because a trial Judge who found a vessel unseaworthy was reversed on appeal, as in *Jones v. Lykes.* This Honorable Court has only recently, in *McAllister v. U. S.*,[64] reversed an appellate court on the question of the legal significance of facts in a simple negligence case; but it can hardly be imagined that, because of this action in the *McAllister* case, the average-reasonable-man test no longer merits retention in the law.

(d) HAVE KEEN'S AUTHORS REPUDIATED IT?

It has been erroneously concluded[65] that the *Keen* decision has been repudiated or "watered down" by its authors in their subsequent decision in *Jones v. Lykes.* Obviously these views were conceived and expressed before the determination by the Court of Appeals for the Second Circuit of the case of *Kelcey v. Tankers Co., Inc.*,[66] which cites *both*

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[61]See 68 Har. L. Rev. 379, 380 (1954).
[62]Stankiewicz v. United Fruit S. S. Corp., et al., supra note 7.
[63]Thompson v. Coastal Oil Co., supra note 7.
[64]McAllister v. U. S., 75 S. Ct. 6 (November 8, 1954).
[65]29 Tul. L. Rev. 141, 144 (1954); Respondent's Brief in Answer to the Petition for the Writ of Certiorari in the instant case, p. 9.
[66]No. 77, Oct. Term, 1954, C. C. 6 2d, Nov. 22, 1954.

Keen and Jones in support of its finding that a vessel was rendered **unseaworthy** by the presence on board of the assailant.

The *Jones* case **strengthens** the *Keen* case by restating the doctrine that the substandard disposition of a crewmember may render a vessel unseaworthy; its holding for defendant is simply the result of an **application** of the *Keen* doctrine. These two cases, *Keen* and *Jones*, based upon the same legal theory, demonstrate a frequent end to litigation: different facts, different results.

The *Keen* doctrine has not been undermined nor diluted.

We submit that the foregoing answers those *Keen* critics who have taken a **negative** approach to the doctrine based upon alleged lack of precedent for it and an unfounded fear as to its workability.

(e) WHAT ARE THE MERITS OF KEEN?

And now, making an **affirmative** evaluation, we find that supporting the *Keen* decision are established principles of maritime law and policy which the court in the *Keen* case has properly applied by analogy to cover the facts of the instant case and future cases of this nature. Among these considerations are:

(1) The *wardship doctrine*, evidencing the benevolence with which the Court has viewed the American seaman

throughout the nation's legal history;[67]

(2) The *warranty of seaworthiness doctrine*, by which the vessel and her owner are held to an absolute and non-delegable duty to guarantee the seaman against the failure of materiel, appliances, gear and hull from latent defects and inadequacies;[68] and,

(3) The *extension of the warranty of seaworthiness* to encompass the *occupational* competence or integrity of the crew.[69]

The *Keen* decision **applies** these principles to the *dispositional* competence or integrity of a crewmember:

> "We can see no reason for saying that, although the owner is liable if the ship's plates are started without his knowledge, he is not liable if he signs on a homicidal paranoiac, whose appearance does not betray his disposition."[70]

As we understand the test applied to the *disposition* of a crewmember it is that he must be "equal in disposition to the ordinary man" who follows the sea. Hull, gear and ap-

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[67]See Garrett v. Moore-McCormack Co., 317 U. S. 239. 63 S. Ct. 246, 87 L. Ed. 239 (1942).

[68]Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

[69]Spellman v. Am. Barge Line Co.; In re Pacific Mail S. S. Co.; The Giles Loring; Holland v Seven Hundred and Twenty-Five Tons of Coal; supra, notes 50, 49, 48, and 47, respectively.

[70]Keen v. Overseas Tankship Corp., 194 F. 2d 515, 518 (C. C. A. 2d, 1952).

pliances must be reasonably fit for the voyage in question by well settled principles, else the ship is unseaworthy. If, because of some latent deficiency in a seaman's temperament or personality he cannot withstand the demands of a long foreign ocean voyage imposing upon him all of the risks and hardships, privations and confinements, incident thereto, and as a result he becomes unstable and commits an unprovoked assault upon another crewmember, can it be fairly said that such a man is "reasonably fit for the voyage in question?" The law has wisely determined that the risk of injury to the seaman from unseaworthy defects, even though latent, in hull and gear shall be borne by the ship. There is no logical reason for any deviation where the defect occurs in the persons who handle the hull and gear.[71] Thus, the doctrine of the *Keen* case merits approval.

(f) UNDER THE KEEN TEST THE INSTANT VESSEL WAS UNSEAWORTHY

Applying the *Keen* test, the trial Court in the case at bar, held that the Steamship *Mason Lykes* was unseaworthy during the voyage in question because of the presence aboard of Manuel Gonzales.[72]

This holding is based upon the Judge's finding[73] that:

> "Manuel Gonzales was a person of violent character, belligerent disposition, excessive drinking hab-

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[71] Ibid.
[72] R. 486; Trial Court's Conclusions of Law, Nos. 2, 3, 4 and 5.
[73] R. 484; Trial Court's Findings, No. 20.

its, disposed to fighting and making threats and assaults."[74]

It is submitted that the Appellate Court below did not disturb the trial Judge's finding of *fact* as to Gonzales' defective disposition and temperament, because of its opinion that there was no liability as a matter of *law*. In any event, the trial Court's finding of fact as to Gonzales' unseaworthy disposition and temperament is not clearly erroneous and, therefore, is unassailable.[75]

It is interesting to note the speculation in which the Court of Appeals for the Fifth Circuit indulges as to what

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[74]The trial Judge's finding is supported by the following evidentary facts, to wit:

R. 86: "The guy (Gonzales) was a big bully in the first place, hollering about who he beat up ashore."

R. 458: Gonzales has been staggered and has staggered others in fights ashore.

R. 89-90: It was generally known aboard ship that Gonzales had a fight with another crewmember, Andy Brown, in Durban, Africa.

R. 93, 112, 319: Gonzales threatened Boudoin; R. 291: and also the Third Mate.

R. 88: "He (Gonzales) was mean, a mean fellow. He just as soon pick a fight with anybody. He just as soon cut a man's throat . . . "

R. 117: "It was generally known that he (Gonzales) was placed in irons because he wouldn't get sober and was a dangerous character on the ship while he was drunk . . . "

R. 434-435: Gonzales admitted he was "gassed up" and/or "drunk," defining his condition thusly: "I consider drunk is when a man is staggering and falls down . . . gassed up, that is when a man drinks and gets enough . . . that is when he passes out, staggers and falls down and such as that."

R. 453-454: "They just drank more than I did. I (Gonzales) just drank until I don't know no more . . . I had enough."

R. 475: Referring to the events in Walvis Bay, Gonzales said, "I would say that I . . . I had enough . . . I was pretty . . . pretty drunk."

R. 298: Gonzales needed restraint, and was placed in irons, to prevent self-harm and his doing harm to anyone else.

[75]Rule 52, Federal Rules of Civil Procedure; 28 U.S.C.A.

the trial Judge "would have thought" about the instant matter if the case of *Jones v. Lykes* had been decided **prior** to the District Court's determination of this cause.[76]

This implies that *Jones* conflicts with *Keen*, which is not the case. The trial Judge's conclusions in the instant case should not be altered by the *Jones* case, and should be affirmed by Your Honors.

The aforesaid appellate conjecture about the influence of *Jones* on the District Judge flows from the intimation of the Court of Appeals for the **Fifth** Circuit that the Court of Appeals for the **Second** Circuit did reach inconsistent results in the *Keen* and *Jones* cases. The impression of inconsistency appears to rest upon the fact that while Jones' injuries resulted from a brutal assault, no less than did Keen's, nevertheless, Jones was denied recovery because no weapon was used and that, therefore, a **weapon** is essential. We submit that the results of these two cases are not inconsistent, because the cases are distinguishable on other facts: In *Keen* the assault was entirely **un**provoked; in *Jones* the victim criticized the assailant's work and thereby **provoked** the assault. The presence of a weapon is immaterial. This is emphasized through a holding recently made by the Court of Appeals for the Second Circuit in the assault case of *Kelcey v. Tankers Co., Inc., supra*, wherein a vessel was held **unseaworthy.** In *Kelcey* the **unprovoked** assault, **without a weapon** resulted in only **minor injuries** to the victim. It is clear then, that the **use of a weapon** and the **vehemence of the assault** are **not essential** to liability under the *Keen* doc-

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[76]R. 507.

trine.[76A] Moreover, from *Kelcey* it can also be seen that in judging whether a seaman is equal in disposition to the ordinary man of the sea, one of the primary questions to be determined is whether or not the assault was **provoked** by the standards of a shipboard community.[77] If the assault is, **in fact, unprovoked,** the assailant should be presumed to be unequal to the ordinary man in the calling. Any other presumption disparages the entire American Merchant Marine.

Judged correctly under the *Keen* decision, Manuel Gonzales rendered the Steamship *Mason Lykes* **unseaworthy** and the conclusion of the trial Judge in this respect should be reinstated.

POINT II

RESPONDENT'S NEGLIGENCE UNDER THE JONES ACT

Boudoin's second claim is that Respondent is liable because it negligently failed to discharge its high degree of responsibility to furnish him with a safe ship and to protect him from abuse and ill treatment, resulting from disorder and lax discipline aboard the Steamship *Mason Lykes.*

Under the General Maritime Law, prior to the *Jones Act* and before *The Osceola*[78] a shipmaster, acting for the owner and through his subordinate officers, was legally bound

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[76A] Even if a weapon is essential, a *weapon* is present in the instant assault: Gonzales used a *glass bottle* on Boudoin's head; R. 91.

[77] Jones v. Lykes Bros. Steamship Co., Inc., 204 F. 2d 815, 817 C.C.A. 2d, 1953).

[78] 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903).

to prevent abuse to a seaman from ill treatment and lack of order and discipline aboard ship.[79] This obligation to protect the seaman was analogized to the owner's duty to provide the crew with a *seaworthy* vessel.[80] Conversely, it was held that the seaman's right to be protected, is a right inherent in and incident to his contract of employment.[81]

After the decision of this Court in *The Osceola*, *supra*, the lower federal courts held that no recovery could be allowed for the failure of the vessel's officers to perform this obligation,[82] except where the person inflicting the ill treatment or abuse was of such despotic, dangerous and substandard disposition as to render the vessel *unseaworthy* by reason of his presence on board.[83]

Following passage of the *Jones Act*, these courts interpreted the failure of the vessel owner to protect the seaman from ill treatment as actionable *negligence* for which the seaman was allowed to recover damages.[84] It is now well established that a shipowner must respond in damages to a

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[79]Gabrielson v. Waydell, et al.; The Lizzie Burrill; The Marion Chilcott; all *supra*, note 7.

[80]See The Marion Chilcott, *supra*, note 7.

[81]The Lizzie Burrill, *supra*, note 7.

[82]The Astral, *supra*, note 7.

[83]Rolph Navigation & Coal Co. v. Kohilas (The Rolph), *supra*, note 7.

[84]These cases seem to embody at least two factual situations: (1) general disorderliness aboard ship such as the encouragement and condonation of fighting by the officers; see Jensen v. U. S.; Stankiewicz v. United Fruit S. S. Corp., et al., *supra*, note 7; and (2) the presence on board the vessel of an officer or crewmember of *known* predisposition toward viciousness from past performances aboard the vessel with the failure of the officers to discharge or restrain such a crewmember; see Kyriakos v. Goulandris; Koehler v. Presque-Isle Transp. Co.; Montiero v. Paco Tankers, Inc., et al.; Nowery v. Smith; Hong v. U. S.; Carpenter v. Matson Navigation Co. (The Hamaqua); all *supra*, note 7. The second category of cases is more nearly applicable to the instant case, inasmuch as here Gonzales' vicious propensities were generally known. R. 86, 88-90, 114-115, 117-118.

seaman injured as a proximate result of lax discipline aboard ship.[85]

(a) *FORESEEABILITY*

In the instant case the trial Judge specifically predicated his conclusion of negligence upon failure of the officers of the Steamship *Mason Lykes* to suppress a drinking party aboard ship[86] in contravention of Shipping Articles and of Respondent's safety rules and regulations.[87]

A serious issue in regard to Respondent's negligence is whether Boudoin's injuries were the legally foreseeable consequences of the laxity of the vessel's officers in their enforcement of discipline and order aboard ship.

The trial Judge held that under the evidence Boudoin's injuries *were* foreseeable and, therefore, Respondent was negligent.[88]

It is with this conclusion of the trial Court that the appellate Court disagrees.[89]

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[85]Ibid.
[86]R. 487; Trial Court's Conclusion No. 7; R. 480-481; Trial Court's Finding No. 4.
[87]R. 480-481; Trial Court's Finding No. 4.
[88]R. 487, Trial Court's Conclusion No. 7.
[89]R. 507, Opinion of the Court of Appeals:
"Search the record as one will, there is no substantial evidence upon which to rest a finding that any of the officers knew, or should have known, that anyone on board the ship was liable to be injured as a result of the drinking going on in the boatswain's room."
R. 508, Opinion of one Court of Appeals:
"It (the assault upon Boudoin) was the result of the entirely unforeseen and unforeseeable acts of Gonzales . . . " (Parenthetical phrase added.)

Under Rule 52,[90] the findings of the trial Court may not be set aside unless they are *clearly erroneous*. Therefore, this Honorable Court, sitting in the same position as the appellate Court below, may consider the evidence to determine whether the prohibition of Rule 52 has been transcended.[91] We submit that Rule 52 has been violated.

The following evidence support's the trial Court's conclusion that, having knowledge of the drinking aboard ship, the vessel's officers should have anticipated that untoward happenings such as the drunken Gonzales' tortious conduct were not unlikely to occur:

(1) Drinking aboard the ship, to *any* extent, was (a) a violation of Respondent's own safety rules,[92] (b) a violation of the Shipping Articles,[93] and (c) in contravention of the general prohibition of the Maritime law.[94]

(2) Nevertheless, during the late hours of the night before Gonzales assaulted Boudoin and during the early hours of the day of the assault, Gonzales and two companions engaged in a drinking bout aboard the ship in the crew's quarters.[95]

(3) During the course of this drinking party Gonzales

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[90]Rule 52, Federal Rules of Civil Procedure; 28 U.S.C.A.
[91]McAllister v. U. S., *supra*.
[92]R. 136, 147-149, 326.
[93]R. 228, 243-244; Deft.-Pl. Ex. 18.
[94]18 U.S.C.A. 2196; 2 Norris, The Law of Seamen 493.
[95]R. 430-432.

drank almost a full bottle of whiskey, in addition to that which he drank ashore.[96]

(4) Gonzales became highly intoxicated during the shipboard drinking party.[97]

(5) Gonzales and his drinking companions became boisterous, to the extent that the noise of their revelry could be heard in the messhall and in the passageway running through the crew's quarters.[98]

(6) Gonzales had a general reputation aboard the ship for belligerence, especially when drunk.[99]

(7) During the hours of the drinking party one of the ship's officers was on watch with the duty of policing the ship by making routine inspections throughout the vessel.[100]

(8) During the time after midnight when Gonzales and the boatswain and the others were drinking, the watch officer frequently inspected the crew's quarters while the party was in progress there.[101]

(9) At some point at or near the end of the drinking bout, Gonzales entered Boudoin's room in the crew's quar-

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[96]R. 436.
[97]R. 434-435 475.
[98]R. 78-79, 82-83.
[99]R. 88-90, 114-115; It is pertinent to observe with regard to Gonzales' reputation that Boudoin was not the only one who avoided him, (R. 79); but further, a fireman named Coutee who was even a "good buddy" and "friend" of Gonzales "wanted to get away" from Gonzales after having one drink with him aboard ship (R. 434).
[100]R. 81-82, 326.
[101]R. 105, 131-132; Pl. Ex. 5.

ters at which instant Boudoin, who had not taken part in the shipboard drinking party, was asleep or almost asleep in his bed.[102]

(10) When discovered, Gonzales, with a threat to kill, struck Boudoin on the head with a glass bottle[103] causing the injuries for which this action was brought.

These facts show that the vessel's officers failed to discharge their clear duty to enforce the regulations, order and proper discipline. As a result of their negligence and with their knowledge Gonzales proceeded to become irrational, irresponsible and criminally inclined. While in this condition he assaulted Boudoin without provocation.

Decisions involving indifference of shipboard authority to comparable and identical infractions of safety rules and discipline have held that the shipowner is liable to a seaman proximately injured by the unlawful, disorderly or undesirable condition.[104] In the instant case the condition was shipboard drinking and intoxication which is affirmatively discouraged by the general maritime law.[104A]

The reason for these holdings is clear: an employer, even ashore, does not discharge his duty to conduct his business safely merely by *promulgating* safety rules; in addition he is required to see that rules adopted as safety measures are

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[102]R. 83, 112.
[103]R. 93, 112-113.
[104]Jensen v. U. S.; Stankiewicz v. United Fruit S. S. Corp., et al; both *supra*, note 7.
[104A]A seamen is denied even maintenance and cure if intoxication is proximately responsible for his illness or disability. 2 Norris, The Law of Seamen, p. 231-232, § 600.

effectively adhered to and enforced.[105] In a maritime setting, the captain must adequately provide for the safety of his crew;[106] and the express purpose of the *F.E.L.A.* is to "stimulate carriers to greater diligence for the safety of their employees."[107] The trial Court's findings should be reinstated.

Insofar as the instant appellate decision predicates its result on the doctrine of "foreseeability," the following observations become pertinent:

(1) The vessel's officers knowingly permitted a protracted violation of shipboard safety rules. This *laxity* constitutes Respondent's culpability, and the question of "foreseeability" should address itself not to the assault but to the failure of Respondent to suppress a violation of its own safety measures. Therefore, the question should be: *was harm foreseeable from the breach of this safety rule?* To ask the question is to answer it affirmatively.[107A] Otherwise, what *justification* exists, outside of a moral one, for the rule? In the instant circumstances, moreover, we have not only the employer's regulation but also the prohibition of the Shipping Articles and the maritime law generally, all denouncing shipboard drinking. Under the *F.E.L.A.* an employee whose violation of a safety rule *proximately* injures

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[105] 35 Am. Jur., Master and Servant, § 154, p. 585.

[106] Gabrielson v. Waydell, et al.; The Lizzie Burrill; The Marion Chilcott; all *supra*, note 7.

[107] Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, 1083 (1930).

[107A] If everyone is not familiar with the effect of alcohol on the brain and nervous system (R. 175), at least every man knows that proximate and natural results of alcoholic intoxication are the loss of inhibition, self-restraint and control. It is elementary that a drunk's unpredictable conduct may engender pernicious acts and wrongs against his fellowman, which sobriety would otherwise preclude.

him has his recovery diminished if not defeated.[108] Similarly, when the employer, or one of its employees, violates a statutory safety measure,**"causation"** *not "foreseeability"* is the determinative factor.[109] Should not the same legal approach appertain to the instant situation in view of the policy underlying the explicit expressions of the safety rule against shipboard drinking? The *cause* of the assault, in part at least, was drunkenness.

(2) Even if the Court of Appeals for the Fifth Circuit justifiably envoked the "foreseeability" doctrine, its view that the evidence does not support recovery disregards the significance of record proof, namely: those facts which support the conclusion that injury to a crewmember was not only foreseeable but quite likely in view of Gonzales' boisterous manner and his general reputation for violence especially when drunk.[110] Furthermore, it is not legally required that Respondent, through its ship's officers, should have been able to anticipate the specific assault on Boudoin before liability can be imposed. It is generally agreed that "foreseeability," in the legal sense, does *not* mean that the negligent party must anticipate or foresee the consequence of his act or omission in the *exact form* in which it ultimately occurs. It suffices that the alleged negligent actor should have anticipated only that *some* injury, harm or mischief might result from his act or omission, even though the particular injury or consequence resulting (in this case Gon-

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[108]See Hylton v. So. Ry. Co., 87 F. 2d 393 (C.C.A. 6th, 1937) and cases cited therein.

[109]Carter v. Atlanta & St. A. B. R. Co., 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236.

[110]*Supra*, notes 96-99.

zales' assault upon Boudoin) was not foreseeable in its precise, final form.[111] The *legal* test of "foreseeability" has been met in the instant case.

(b) *SAFE PLACE TO WORK*

It was the duty of Respondent to furnish Boudoin with a safe place in which to work; in a maritime setting this includes a safe place to sleep and rest.[112] A seaman by reason of the nature of his calling is legally entitled to exact a higher degree of care from his employer than a shoreside worker.[113] Having knowledge of the dangers created by the prolonged drinking and especially by one whom Respondent knew or should have known to be particularly dangerous when drunk, Respondent cannot avoid liability, for its failure to keep the vessel safe, by its assertion that the *wilful acts of the other employee* (Gonzales) *contributed* to Boudoin's injuries.[114] By exposing Boudoin to the unconventional, irresponsible and even unpredictable conduct of drunken seamen, Respondent neglected to discharge its legal duty to provide and maintain a safe vessel.

A seaman's forecastle, where he lives, is his "castle."[115] It is regarded as his home and it is a tradition of the sea that he is entitled to defend it.[116] The assailant intruded into

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[111]Pease v. Sinclair Ref. Co., 104 F. 2d 183 (C.C.A. 2d, 1939).
[112]Hern v. Moran Towing & Transportation Co., Inc., 138 F. 2d 900 (C.C.A. 2d, 1943); Rey v. Colonial Navig. Co., 116 F. 2d 580 (C.C.A. 2d, 1941).
[113]Koehler v. Presque-Isle Transp. Co., 141 F. 2d 490 (C.C.A. 2d, 1944).
[114]Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140, 142, 92 L. Ed. 73 (1947).
[115]R. 439.
[116]R. 347.

Boudoin's forecastle while he was asleep and assaulted him. As the Chief Mate testified, this was surely no accident and supposedly someone is at fault and to blame.[117] How widespread is respondent's negligence? Can its representatives be excused by passing the baton of responsibility? A cumulative effect may result from respondent's many laxities, which, in the chain of events, may be charted from this assailant up to the ship captain:

Maintenance-man Gonzales: The first and lowest link in the chain is the assailant. He is a man who habitually drinks himself into irresponsibility, not only ashore with strangers in a foreign port[118] but also with friends aboard his own ship;[119] given to threats[120] and fighting;[121] absenting himself without leave from his vessels;[122] requiring incarceration aboard his ships.[123]

Boatswain Oswald: This highest ranking unlicensed member of the ship's personnel residing in the crew's quarters was derelict in abetting instead of discouraging his subordinate maintenance-man, Gonzales, in bringing whiskey aboard ship and drinking it in the boatswain's own quarters[124] in violation of the captain's orders[125] and the shipping articles,[126] the boatswain continuing in his negligent

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[117]R. 372.
[118]R. 453.
[119]R. 434-436, 475.
[120]R. 93, 112-113, 291, 322.
[121]R. 86, 89-90, 458.
[122]R. 304, 472.
[123]R. 293, 472.
[124]R. 430.
[125]R. 326-325.
[126]R. 136.

dereliction until he passed out drunk.[127]

Gangway Watch: It was part of the routine duty of the crewmember assigned to the gangway watch that he should report to the watch officer if a badly intoxicated seaman came aboard,[128] which he neglected to do probably because the Chief Mate failed to so instruct him[129] or because he was not watching the gangway.[130]

Third Mate Brock: This officer, who had the duty of the watch and made frequent inspections of the crew's quarters,[131] negligently failed to suppress the drinking party.[132]

Chief Mate Staggers: This officer, who ranks immediately below the master, knowingly tolerated the infraction of the rules against bringing and consuming liquor aboard the ship,[133] and even he, himself, occasionally brought whiskey aboard.[134]

Captain Townsend: This shipmaster has the non-delegable responsibility for maintaining decorum aboard the vessel, at sea or in port.[135] He placed the responsibility on the watch officer to maintain peace aboard the vessel;[136] and he would neither expect nor want other crewmembers to report that Gonzales was drinking intoxicants aboard the

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[127]R. 80.
[128]R. 324.
[129]R. 383.
[130]R. 430.
[131]R. 105.
[132]R. 480-481; Trial Court's Finding No. 4.
[133]R. 383.
[134]R. 384.
[135]R. 222.
[136]R. 326.

ship, as he did not regard it as the crewmembers' duty to see that the ship's regulations should be enforced.[137] It never occurred to this captain that a drunk man coming aboard the ship ought to be watched in order to prevent him from doing harm to another person, and the master never ordered such precaution.[138]

Nor does Respondent's indifference end at the "water line":

Assistant Manager of Insurance and Claims Division Beyer: He has an index and card system concerning men who were "performers" or were guilty of misconduct,[139] including information covering assaults on fellow crewmembers.[140] The laxity of his surveillance is demonstrated by the fact that although he has a record on Gonzales concerning a minor injury to his elbow on which no claim was made,[141] there was no entry pertaining to any act of misconduct on Gonzales' part, nor his intoxication, nor his missing watches, nor his going ashore without permission, nor his fines and loggings, nor his being placed in irons after the Boudoin incident.[142]

Assistant Manager of Marine Division Biggers: He would consider as a safe man to employ aboard his company's vessel one who attacked another crewmember and seriously injured him with a glass bottle, if there was no complaint

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137R. 326.
138R. 325.
139R. 247.
140R. 253.
141R. 250.
142R. 249.

about that man;[143] and he knew there was no certainty that the hiring hall through which the seamen were employed would screen the men, and that the union would not assume the responsibility of determining the acceptability of those men who were unfit.[144]

Vice-President Jimison: Respondent's corporate officer reveals the laxity of the company, in its policy and enforcement, by the fact that Gonzales was not rejected for employment even after his offense against Boudoin.[145] Notwithstanding that his shipmaster of the Steamship *Mason Lykes*, Captain Townsend, had fired Gonzales after the Boudoin incident because that finished Gonzales and the captain would not have him aboard his vessel,[146] nevertheless this shipping company re-employed the assailant, Gonzales, on several of its other vessels up to the time of trial.[147] This laxity and indifference of the company for the safety of its employees is highlighted by the fact that this company apparently did not know at the time the case was being heard by the trial Judge[148] that the assailant, Gonzales, was in its employ aboard one of its vessels.[149]

The foregoing reveals that the sum total of respondent's actions and inaction toward the safety of its employees is the antithesis of the goal of the *F.E.L.A.* whose purpose is to stimulate carriers to greater diligence in protecting employees from personal injury.[149A]

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[143]R. 216.
[144]R. 210.
[145]R. 143, 216.
[146]R. 324.
[147]R. 215.
[148]R. 225-226, 263-264.
[149]R. 419.
[149A]Jamison v. Encarnacion, *supra*, note 107.

(c) LIABILITY FOR ASSAULT BY SUBORDINATE EMPLOYEES

The case at bar involves an assault by one unlicensed crew member upon another and the opinion under review has held, in effect, that " . . . a shipowner is not to be held liable for an assault unless: (1) it is committed by a superior on a subordinate in carrying out the ship's work; . . ."[150]

Such a holding is contrary to the decision of this Court in *Steely v. Kurn.*[151]

The Court of Appeals for the Fifth Circuit apparently based its holding upon the construction which earlier decisions[152] have given to the decisions of this Honorable Court in *Jamison v. Encarnacion*[153] and *Alpha S. S. Corp. v. Cain,*[154] which did involve the factual situation of a "superior-subordinate" assault.

However, in the *Steely* case a petition for *certiorari* was presented in an *F.E.L.A.* case wherein a railroad employee was **wilfully** injured by another employee of **equal station.** Instead of attacking the victim with a "weapon" as that

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[150]R. 503 and note 2 thereon.
[151]Steely v. Kurn, 313 U. S. 545 (1941).
[152]Kable v. U. S., 169 F. 2d 90 (C.C.A. 2d, 1948); Pittsburgh S. S. Co. v. Scott, 159 F. 2d 373 (C.C.A. 6th, 1947); Brailas v. Shepard S. S. Co., 152 F. 2d 849 (C.C.A. 2d, 1945); Lykes Bros. S. S. Co., Inc. v. Grubaugh, 128 F. 2d 387 (C.C.A. 5th, 1942); Yukes v. Globe S. S. Corp., 107 F. 2d 888 (C.C.A. 6th, 1939); Escandon v. Pan-American Foreign Corp., et al., 88 F. 2d 276 (C.C.A. 5th, 1937); Nelson v. Am.-West African Line, Inc., 86 F. 2d 730 (C.C.A. 2d, 1936); and see Bonsalem v. Byron S. S. Co., Ltd., 50 F. 2d 114 (C.C.A. 2d, 1931).
[153]Supra, note 7.
[154]Ibid.

term generally implies, the assailant used a piece of equipment, which both men happened to be carrying at the time, to inflict the battery. The employer succeeded in convincing the state courts, in which the action was tried and appealed, that since the assault was **wilful,** and **not committed by a superior** upon his subordinate to speed the work or reprimand the subordinate, the employer was not liable for "negligence" under *Jamison* and *Alpha S. S. Corp.* Obviously, if these latter decisions applied **only** to the factual situation contained in them, the position of the railroad in the *Steely* case would have been well taken. But, in *Steely*, this Honorable Court granted the application for the *writ* and, by a *per curiam* opinion, reversed and remanded the case, citing as authority only *Jamison v. Encarnacion.* It appears, therefore, that with the *Steely* decision, this Honorable Court has viewed with disapproval the prior jurisprudence which gave to *Jamison and Alpha S. S. Corp.*, a restrictive application. Such a view is certainly well justified.

In *Jamison,* the Court reasoned (a) that the injuries to the assaulted subordinate arose out of the employment, during which the employer would, unquestionably, have been liable for the same injuries if "negligently" inflicted by the superior employee; and (b) that, therefore, the spirit and purpose of the *Jones Act* require that liability result from a **wilful** act injuring the employee in the course of his employment.[155]

Therefore, *Steely v. Kurn* can be said to stand for the proposition that the employer will be liable, even for wilful in-

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[155]Ibid.

juries, if he would have been liable had the injuries been inflicted by carelessness of the offending employee, provided the victim is in the scope of his employment.

In the instant case, Boudoin was in the course of his employment, even though he was resting and not actually working when injured.[156] As has been observed, by the very nature of his employment the ship was his "home;" it has been held that rest and recreation are part of a seaman's service of the ship, essential to his ability to withstand the rigorous demands of his calling.[157] Boudoin was not at liberty to leave the ship in this foreign port without the permission of the captain;[158] he was subject to call at any time that circumstances required his actual physical labor; and he bound himself to abide by all such lawful commands during the voyage.[159] Also the assailant in the instant case, by the nature of the employment, was required to "live on the job." At the time of the assault, or for several hours immediately prior thereto, Gonzales was engaged in "recreation" (unlawful though it was)[160] aboard the vessel. Injuries aboard ship, arising out of recreation, are held to occur in the course of employment when they were **carelessly**

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[156]See Sundberg v. Washington Fish & Oyster Co., 138 F. 2d 801, 803 (C.C.A. 9th, 1943) and cases cited therein.

[157]Farrell v. U. S., 336 U. S. 511, 69 S. Ct. 707, 93 L. Ed. 658 (1949); Aguilar v. Std. Oil Co. of N. J., 318 U. S. 724, 63 S. Ct. 930, 87 L. Ed. 1107 (1943). Calmar S. S. Co. v. Taylor, 303 U. S. 525, 58 S. Ct. 651, 82 L. Ed. 993.

[158]R. 228, 243-244, Deft.-Pl. Ex. 18.

[159]Ibid.

[160]See Ford v. United Fruit Co., et al., 171 F. 2d 641 (C.C.A. 9th, 1948), wherein the offending seaman was engaged in recreation *not* in violation of any ship rules governing the conduct of seamen or other persons aboard the vessel.

inflicted.[161] Therefore, under *Steely v. Kurn*, applying the *Jamison* case, the wilful injuries to Boudoin by another employee of equal station should impose liability upon Respondent.

It cannot be overlooked that this interpretation of the *Steely* decision creates somewhat of an incongruity between that decision and the one in *Davis v. Green*,[162] decided prior to *Jamison* and upon facts opposite of it, that is, in the *Davis* case a subordinate assaulted his superior. It is submitted however, that the *Steely* case embodies the proper rule and better accords with the intent and purpose of these federal statutes.

Furthermore, the *F.E.L.A.*, by its letter, may be said to refer to two bases of liability, to wit: (1) liability for *negligence of employees;* and (2) liability for the *carrier's own negligence.*[163] If the first, *negligence of employees,* be given its **broadest** meaning at common law, as indicated in *Jamison v. Encarnacion,* the term "negligence" should **not exclude wilful torts** by one employee against another. The statutes and the *Steely* case, should be construed to impose liability upon the employer in any case where the **assailant, himself, would have been liable at common law,** provided

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[161]Sundberg v. Washington Fish & Oyster Co., *supra*, note 156.
[162]260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299 (1922).
[163]45 U. S. C. A. 51.

the victim is in the course and scope of his employment when injured.[164] The test of what the assailant was doing at the time should not be used as a basis of liability because, as one recent commentator has observed, even when a negligent employee acts **inadvertently,** he is not furthering the interests of his employer.[165] Of course, in the instant case, Gonzales' so-called recreation was no less a part of the employment than was Boudoin's rest and, in that sense, both employees were in the service of their ship, i.e., in the course of their employment. This fact strengthens the proposition that liability should be imposed here upon a theory of the "direct negligence" or wilful tort of the **employee,** rather than denied under a doctrine of **"respondent superior,"** since the *Jones Act* and the *F.E.L.A.* require that the **injured employee only** be "in the course of his employment" or be "employed" at the time of the injury.

Respondent herein should be held liable for the actions of its employee, Gonzales, including for his assault upon Boudoin.

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[164] In the absence of such an interpretation, i.e., with a rigid adherence to *Davis v. Green* and those cases restricting *Jamison* to its facts, a strange anomaly results, *viz:* "Two seamen are performing the job of carrying a piece of equipment; out of sheer malice one drops his end on the other seaman; under *Steely v. Kurn* the employer is liable. The same two seamen do the same job and *place the equipment at rest;* out of the same sheer malice, one manages to lift the object again and drops it on his shipmate; under *Davis v. Green,* the employer is *not* liable."

[165] 40 Va. L. Rev. 599, 614 (1954).

CONCLUSION

It is respectfully submitted that under the principles of the General Maritime Law the Steamship *Mason Lykes* was unseaworthy by reason of the presence aboard and actions of the defective seaman Gonzales, and that under the statutory provisions of the *Jones Act* the respondent shipping company and its representatives were negligent in the particulars hereinabove set forth. Therefore, plaintiff is entitled to recover damages for his resultant injuries. We further submit that the findings and conclusions of the District Court regarding liability should be reinstated, and that this cause should be remanded to the Court of Appeals for the Fifth Circuit for further proceedings on the question of *quantum*.

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